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### Submission to ALRC, incarceration rates of Aboriginal and Torres Strait Islander peoples

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## Submission to ALRC, incarceration rates of Aboriginal and Torres Strait Islander peoples

### Abstract

The case for reform to address the massively disproportionate incarceration rates of ATSI peoples can and should be made on the basis that it can bring about a more effective, as well as a fairer, system of criminal justice, one that engages with the legacy of historical injustice rather than perpetuating it. A realisable aim is to make communities safer as well as reducing reliance upon costly and damaging criminal justice policies and practices. ATSI people have the greatest investment in this as the principal victims of crime within their communities. With thoughtful, evidence-based reforms, there need be no necessary trade-off between the interests of offenders on the one hand and victims and the wider community on the other. As has been shown time and time again, punitiveness by way of high incarceration rates does not necessarily deliver greater community safety. On the contrary, it can form part of a vicious spiral that erodes the fabric of community and family in ways that increase crime and contact with the criminal justice system.

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# **ALRC, INCARCERATION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (2017)**

## **SUBMISSION**

**Russell Hogg<sup>1</sup> and Julia Quilter<sup>2</sup>**

### **Introduction**

The case for reform to address the massively disproportionate incarceration rates of ATSI peoples can and should be made on the basis that it can bring about a more effective, as well as a fairer, system of criminal justice, one that engages with the legacy of historical injustice rather than perpetuating it. A realisable aim is to make communities safer as well as reducing reliance upon costly and damaging criminal justice policies and practices. ATSI people have the greatest investment in this as the principal victims of crime within their communities. With thoughtful, evidence-based reforms, there need be no necessary trade-off between the interests of offenders on the one hand and victims and the wider community on the other. As has been shown time and time again, punitiveness by way of high incarceration rates does not necessarily deliver greater community safety. On the contrary, it can form part of a vicious spiral that erodes the fabric of community and family in ways that increase crime and contact with the criminal justice system.

Punishment and the threat of punishment are not the primary inhibitors of crime. Where they are sought to be relied upon as such they are likely to become part of the problem. This, we submit, is the case with ATSI peoples in Australia. It is a legacy of colonisation – of dispossession, segregation, exclusion, the breaking up of families, the calculated erosion of Indigenous authority structures, state control of the minutiae of peoples' lives, discrimination in education and employment and prohibitions on ownership of property. It can be seen in the fact that, as with indigenous peoples in other colonial settler states, extreme poverty, serious levels of violence and massively disproportionate incarceration rates afflict so many ATSI communities in Australia today.<sup>3</sup> Year in year out Australia sits second in the UN Human Development Index (HDI), but the HDI of ATSI in Australia is roughly the same as that of Cape Verde and El Salvador, about one hundred and third in the world.<sup>4</sup> The forces militating against the building of stable family and community life for so many people, that in turn engender trauma, conflict and violence and create exposure to criminal justice intervention, may lie in the past, but as the American writer William Faulkner said: 'The past is never dead. It is not even past.' The present role of the criminal justice system in ATSI lives serves in so many ways to link past and present and perpetuate social and economic exclusion and marginalisation.

It should also be stressed by way of introduction that whilst there are numerous factors, historical and contemporary, that influence ATSI interaction with the criminal justice system and require ATSI-specific responses, it is also the case that ATSI people suffer disproportionately the adverse effects of more general system problems, like for example the

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<sup>3</sup> United Nations Department of Economic and Social Affairs (2009) *State of the World's Indigenous Peoples*. New York: United Nations.

<sup>4</sup> Ibid at 23.

paucity of sentencing options and support services in rural and regional communities. This is a fundamental problem that flies even in the face of claims of formal equality that lie at the heart of the administration of criminal justice. Such problems need to be addressed in the interests of all, but will deliver particular benefits to ATSI people who are most affected by them.

### **Reframing the Problem**

At an Australian Institute of Criminology workshop in 1985, the late Dr R. Sykes argued it was necessary to up-end the way we look at the relationship between Aboriginal people and the criminal justice system:

...this workshop is being held because the criminal justice system has started counting heads and now finds that it's in trouble. The head counting has revealed that disproportionate numbers of Blacks are incarcerated, and that the justice system has been anything but just. By world standards and through international comparisons, it finds itself in trouble because of its track record.

We should have got this straight at the very beginning of this Workshop, not here at the end. I am personally very tired of reading articles and statistics that speak only to the impact of Black criminality on the justice system – the number of Blacks in the prison population, for example. If we were conducting an exercise motivated by the best interests of the Black community, the manner in which information is gathered would be very much different. We would measure instead the extent of damage done to the Black community by the incarceration of and loss of so many of its people. We would talk about the effect of having one quarter or one fifth of all Black males between the ages of 15 and 30 caught up in the justice system. Prison population statistics are a very crude indicator of the extent of damage being done to the Black community. For every one Black male sitting in prison, there is at least one more, maybe two, outside and in stress because of impending charges and possible conviction, or acting frantic in the Black community trying to get money together to pay fines, or wandering around unable to take care of his family obligations because, with a criminal record, he can't make it in an already tight job market.<sup>5</sup>

This carries implications for both the way we understand the problems and the approach taken to address them.

Data confirms that the situation has worsened since 1985 and this notwithstanding the recommendations of the RCIADIC that followed a few years later. A BOCSAR<sup>6</sup> study found the overall rates of contact (ie of the NSW population aged 10 and above) with the criminal courts in 2001 to be as follows:

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<sup>5</sup> Dr R Sykes, 'Self-determination: implications for Criminal Justice Policy Makers', paper delivered to the Australian Institute of Criminology, Aboriginal Criminal Justice Workshop Series, Workshop No. 1, May 1, 1985.

<sup>6</sup> D Weatherburn, B Lind and J Hua, *Contact with the New South Wales court and prison systems: the influence of age, Indigenous status and gender*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No. 78, 2003.

All persons	1.9%
Total male population	3.2%
Total female population	0.7%
Indigenous males	19.7%
Indigenous females	12.8%
Indigenous males 15-19	21.7%
Indigenous males 20-24	41.3%
Indigenous males 25-29	37.7%
Indigenous males 30-34	35.1%
Indigenous males 35-39	25.7%

These data speak for themselves as to the scale of young Indigenous male contact with the criminal courts. Roughly four out of 10 young Indigenous men in their 20s and early 30s faced charges in NSW criminal courts in 2001. Approximately one in 10 Indigenous men in their 20s were imprisoned as a result of charges. Indigenous female contact with the courts is significantly lower but still astonishingly high: 13.6% for those aged 20-24, over 12% for the 25-29 group and almost 10% for those in the 30-34 group.

It would be difficult to compute with precision, but if one were to couple these data with the numbers actually serving sentences, on remand, on parole or under some other correctional supervision in the community, or subject to out-of-court fines (penalty notices or infringement notices), at any given time it is likely that there would be relatively few Indigenous families not directly entangled in the criminal justice system, by virtue of having a close relative under some form of criminal justice supervision. Extrapolating from these data the numbers for young men actually caught up in the system at any given moment must, in particular, be breathtakingly high, perhaps one in three or four. As Dr Sykes suggested, this cannot be anything other than socially, demographically, economically and psychologically catastrophic for any community, producing disastrous effects on employment, household incomes, education, inter-generational relationships and so on. Put in plain terms it is criminogenic.

Hunter and Borland<sup>7</sup> found that arrest had the effect of reducing the probability of Indigenous employment by 18.3% and 13.1% respectively for males and females and that differences in arrest rates for Indigenous and non-Indigenous Australians may explain about 15% of the difference in employment rates for the two groups.

More recently, in a major econometric analysis of Aboriginal disadvantage in NSW cities, Reeve and Bradford<sup>8</sup> found that there was an interdependent relationship between the

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<sup>7</sup> B Hunter and J Borland, *The effect of arrest on indigenous employment prospects*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No. 45, 1999.

<sup>8</sup> R Reeve and W. Bradford, 'Aboriginal Disadvantage in Major Cities of New South Wales: Evidence for Holistic Policy Approaches', *The Australian Economic Review* (2014) 47(2): 199-217.

different dimensions of Aboriginal disadvantage, and in particular, that ‘interaction with the criminal justice system, long-term health, victimisation and labour force outcomes are all connected’. Increased years of schooling increases the probability of employment and reduces the likelihood of contact with the juvenile justice system which in turn reduces the probability of adult imprisonment. The authors concluded that ‘reduced interaction with the criminal justice system is predicted to impact positively on employment rates...This is consistent with previous research findings nationally.’.

Thus, the role of the criminal justice system cannot be disentangled from the complex dynamics that sustain and compound high levels of disadvantage and in turn contribute directly to high levels of victimisation in many ATSI communities.

A ‘business as usual’ attitude to criminal justice makes it complicit in perpetuating the very problems it is mandated to prevent.

It is possible to take very specific and concrete examples of how this is the case. In the case of family violence – and there is perhaps no graver crime problem facing the entire nation as well as ATSI communities – the breach of protection orders (AVOs and the like) are most commonly sanctioned by way of a fine or a short term of imprisonment. Where a fine is imposed it is worth asking how often is it the case that the victim gets saddled with payment where she has been in a domestic relationship with the offender? And how often is this a source of additional financial stress for the victim and perhaps on many occasions a cause of further tension, conflict and violence?

Fines are the most common penalty imposed by the courts and out-of-court fines (numbering almost 3 million per year in NSW and 6 million in Victoria) massively outnumber court-imposed fines. They are regarded as the most lenient of penalties imposed for minor offences. Yet they – and especially penalty/infringement notice regimes – draw large numbers of people into the purview of the criminal justice system, often with anything but trivial impacts, especially for the most economically and socially vulnerable.

The case referred to in the Discussion Paper of the Aboriginal boy repeatedly fined for failing to wear a helmet when riding his bike to school is a case in point. Linking such localized, apparently minor actions by a police officer and the later adult incarceration of this boy there is likely to be a chain of factors: the police actions can (quite reasonably) be seen as a disincentive to school attendance (a significant protective factor against involvement in the juvenile justice system and later unemployment); mounting fines exacerbate household economic disadvantage and poverty and possibly foster tension and violence in already financially and socially stressed families; inability to discharge a fines debt prevents a young person from acquiring a driver’s licence (or any other type of licence issued by RMS), thus adversely affecting employment prospects, and creating the risk of further and deeper involvement with the criminal justice system if the person drives unlicensed.

### **A ‘Bottom-up’ Approach and Justice Reinvestment**

In light of the arguments and examples above, it is a great strength of the framework set out in the Discussion Paper that it adopts a ‘bottom-up’ approach and recognizes the multiple points of contact and complex pathways into the criminal justice system and incarceration,

with its recommendations on fines, driving offences, justice procedure offences, public order, alcohol and policing. It is how these points of contact interact with the concrete realities of people's lives – often overlooked, uncomprehended, misunderstood or stigmatized by criminal justice professionals with very different life experiences – that is a key to understanding levels of ATSI contact with the system and how this might be addressed. It is a point often made that for so many ATSI people it is minor but repeat contact that ultimately has the effect of progressively escalating entanglement in the system to serious levels.

The Justice Reinvestment (JR) approach speaks to these realities, involving as it does the idea that resources should, and can more cost-effectively, be utilized to prevent such entanglement and that mechanisms of engagement and accountability with ATSI communities is absolutely vital to finding enduring solutions. It is suggested that JR provides a conceptually and practically useful umbrella framework for the sort of policy reorientation demanded by Dr Sykes back in the 1980s.

It is in the nature of a Discussion Paper and consultation process that discrete recommendations be laid out and responded to, but this should not be permitted to overshadow the importance of a more holistic and integrated approach to the issues. So many of the recommendations and the issues to which they are addressed are interdependent. Taking up issues and recommendations relating to some part of the system can have unintended consequences on others. For example, abolishing short prison sentences or the introduction of specialist pre-sentence reports are likely to founder or worse if credible alternative sentencing options and the infrastructure and services required to support them are not also provided.

Comfort can be taken from the fact that reform is possible. The criminal justice system does not, as some assume, function on a hydraulic principle: 'you do the crime, you do the time'. We know that the vast majority of crimes are managed (sometimes very well, sometimes in oppressive or unsatisfactory ways) *outside* the system. Only a small fraction of total crime – even that which otherwise constitutes grist for the criminal justice mill (assaults, thefts, etc) – even comes to the attention of the police. Lately, we have had constant reminders of the scale of crime that occurs in various parts of the commercial world, including wage theft, fraud and other crimes, some of it much more serious than most of the offences that pass through the hands of police and courts. Rarely do these matters end up in the system. Regulation, where it exists, is more likely to be conducted with, rather than against, the grain of self-regulatory efforts and by way of enlisting the cooperation of organisations and individuals involved. In these areas a very decentralized approach tends to be taken to the administration of justice in which criminal prosecution tends to be a last resort and one sparingly used. This is a reminder of the immense discretion that exists at every phase of the criminal process.

There is also the fundamental common law principle of *prosecution in the public interest* recognised in Office of Director of Public Prosecutions Guidelines throughout Australia.<sup>9</sup> That is to say, a prosecution should be undertaken not solely on account of the availability of evidence that would support a conviction, but only where the public interest demands it. There is a real question as to just how well this principle and the responsibility that attaches

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<sup>9</sup> See for example, Office of the Department of Prosecutions, *Prosecutions Guidelines* (2007), Guideline 4 'The Decision to Prosecute'.

to it, is understood, let alone observed, by police who at the end of the day are responsible for both initiating and prosecuting the vast majority of cases that go before the courts.

## **Policing Issues**

Police are the key gate-keepers of the criminal process. Their decisions are in many respects the most consequential in the whole system, but at the same time they tend to be taken in low-visibility settings that are resistant to effective accountability in relation to their effects. Police often hide behind some version of the hydraulic principle mentioned above - that their role is simply to put (suspected) offenders before the courts – but this is simplistic. In the first place, the principle of prosecution in the public interest dictates that police *should* make choices as to when it is, and is not, just and appropriate to formally invoke the criminal law. Secondly, the reality is that in practice they must, and routinely, do so. Discretion not to invoke the law necessarily arises from the vast array of laws the police are charged with enforcing, the myriad situations they confront in which some law might be invoked to justify an arrest and from ‘the substantive breadth and vagueness of the law itself’. These factors are prominent in relation to public order laws and situations but are not so confined. As Lustgarten points out, ‘the result is that the police invariably under-enforce the law’ simply as a matter of common sense and so as not to drag the law ‘into disrepute’, and yet, as he further observes ‘the result is to turn conventional thinking about policing on its head’ –

The equation of policing with enforcement of the Law – the august embodiment of state sovereignty – becomes untenable. For most less serious offences under-enforcement is the norm; precisely for that reason, enforcement can be a serious abuse of power. The “common sense” which tempers full enforcement may readily become a cloak for conscious or unconscious discrimination on the basis of political opinion, personal appearance, demeanour, social status or race. Under-enforcement becomes selective enforcement.<sup>10</sup>

It goes without saying that the history of ATSI/police relationships is a parlous one. Operating against this background much every day policing of ATSI can reasonably be seen to be *selective* in the sense described by Lustgarten and as cloaking the sort of extra-legal factors he lists. As he suggests, it need not involve conscious discrimination, racially based or otherwise, to constitute selective enforcement.

We know from the national custody surveys initiated by the RCIADIC (which unfortunately ceased after the last one undertaken in 2002) that much of the time police powers of arrest and custody in relation to ATSI suspects relate not to serious crime but minor public order offences or drunkenness – in 2002, over 40% and higher in the earlier surveys. This is precisely the area in which vaguely defined offences, broad discretions and selective enforcement has been and continues to be most evident. Much of this policing activity, with its damaging impacts for individuals and communities affected, its detrimental effect on police/community relations and its wasteful expenditure of criminal justice resources could be avoided by the adoption of different styles of policing in ATSI communities.

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<sup>10</sup> L Lustgarten, *The Governance of the Police*, Sweet and Maxwell, London, 1986, p 15.



The point to be stressed here is that the discretion exists to do things differently, to adopt more constructive and cooperative approaches to policing, such as are suggested by examples given in the Discussion Paper (like the breach reduction strategy in relation to bail in Bourke).

It is vital that such problem-solving approaches to justice be promoted in all areas of police training, organisation, work, performance indicators, etc. ‘Good’ policing utilizes the abundant discretion police have at their command, their nuanced knowledge of context and situation and their connections with local networks to resolve problems at the local level, not reflexively place them on the criminal justice conveyor belt.

Alongside the interest in problem-solving approaches in police circles we are also seeing a growing commitment to ‘intelligence-led’ policing (ILP). Policing is of course a knowledge-based practice and ‘intelligence’ could serve the ends of problem-solving, but ILP means something rather different if (as there is evidence to suggest) it simply involves police being tasked to ‘put away the usual suspects’, for example by raiding the homes of persons recently released on parole or those on bail, to breach them if possible. This is also where ATSI are often highly vulnerable, as perhaps indicated by the incidence of ‘justice procedures’ offences. This style of policing contrasts sharply with the sort of philosophy underpinning an approach like the bail reduction strategy referred to above where the concern is that policing aim to encourage and support substantive compliance.

### **Penalty/Infringement Notices**

The attention given to these issues in the Discussion Paper is most welcome. As Professor Richard Fox commented in a conference presentation some years ago:

Australian figures indicate that if the proportion of accusations reaching the criminal justice system as on-the spot fines is a fair measure of the significance of this measure in the overall system, it is proper to conclude that the main business of criminal justice is no longer serious crime. Nor even is it crime which is pursued in the criminal courts. The number of cases of alleged wrong-doing handled through the on-the-spot fine procedure clearly outstrips all other classes of offence.

This is more obviously the case today given the rapidly growing number of matters dealt with by such fines. As noted earlier, these can be highly consequential especially for the most vulnerable. We quote here from an as yet unpublished article by the authors of this submission:<sup>11</sup>

We do know from research and official inquiries that fines have disproportionate and serious adverse impacts on disadvantaged sections of the community: Indigenous Australians, the young, homeless, the welfare dependent, mentally ill, people with intellectual disabilities and prisoners. These groups are more vulnerable to being fined in the first place and to accruing multiple fines. They are less likely to be able to pay fines or to negotiate the processes available to contest them or otherwise mitigate their impact. Literacy and numeracy problems, language difficulties, housing insecurity and residential transience ensure that many will fall foul of inflexible administrative systems that are insensitive to the circumstances of the poor and marginal (official

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<sup>11</sup> J Quilter and R Hogg, ‘The Hidden Punitiveness of Fines’, *International Journal of Crime, Justice and Social Democracy*, forthcoming 2018.

correspondence not received or not understood, inability to provide relevant documentation or utilize on-line systems that are heavily dependent on complex forms and written information). For the most disadvantaged criminal justice debt simply compounds civil debt problems and other hardships, confronting people with often impossible choices about which bills to pay. Paying a fine will likely appear less urgent to a household confronted with the prospect of having the electricity disconnected, not being able to put food on the table or being evicted for failing to pay rent, thus requiring the longer-term consequences of default to be simply put out of mind. Or paralysis or fatalism may set in where people are overwhelmed by the cumulative stresses in their lives. To the extent that fines, as debt, are transferable for the most disadvantaged, this may simply exacerbate household poverty, tensions and conflict. Involvement with the criminal justice system may be escalated, whether through secondary offending (driving while licence suspended), turning to acquisitive crime or due to other instability and disorder caused by multiple disadvantage (drug and/or alcohol problems, 'sleeping rough', violent conflict, etc) (Swartz and Cunneen 2009; Cunneen and Swartz 2009; NSW Sentencing Council 2006; NSW Ombudsman 2009). Indigenous Australians are hit particularly hard by these dynamics in which financial penalties, far from providing an alternative to punitive justice, are more likely to afford pathways into the punitive reaches of the system (Swartz and Cunneen 2009; Cunneen and Swartz 2009). A 2008 survey found that over 40% of the Aboriginal community in NSW had outstanding debts with the State Debt Recovery Office (Elliott and Shanahan Research 2008). A NSW Ombudsman report (2009) found that nine out of ten Aboriginal persons issued with a criminal infringement notice failed to pay in time and were referred for enforcement. As the Ombudsman (2009: 50) pointed out, 'debts from CINs could add to the cumulative stresses associated with poverty in communities already struggling to cope with chronic debt.'

Hardships and unfairness are further compounded where non-payment results in driving sanctions. Quoting again from the unpublished article:

This enforcement mechanism impacts on large numbers of persons. In the first half of 2016 88,849 persons in NSW had their licences suspended for fine default (NSW RMS 2016). This exceeded the aggregate of suspensions and cancellations for all other reasons. Given the reliance upon driving by many people for employment and educational purposes, to access essential services, for entertainment including to see family and friends, and to undertake caring responsibilities, license suspension/cancellation in and of itself is highly punitive.

The impacts on some communities are particularly harsh. The NSWLAC Inquiry (2013: 10-17) found that vulnerable groups (economically and socially disadvantaged sectors of the community), those living in regional, rural and remote areas, Aboriginal communities and young people were most impacted. The NSW LRC inquiry (2012) on penalty notices found that 'there are some Aboriginal communities in which there may be only one or two licensed drivers and that these drivers come under pressure to act as "taxi drivers" to transport people to essential appointments. We also heard about the pressures on unlicensed people to drive unlawfully (for example to attend family funerals or to transport sick children). Grave concerns were expressed about the number of young Aboriginal men who are imprisoned for repeated "drive while disqualified" offences, and about the consequent impact of imprisonment on them and their families.' (2012: 378 [16.5]) Close to a quarter of Indigenous appearances in

NSW local courts are for motoring offences. The number of Indigenous people sentenced to imprisonment for driving while licence suspended or disqualified increased by 35% in the first decade of the century. They constituted over a third of all people incarcerated for that offence (Beranger et al 2010: 3).<sup>12</sup>

Notwithstanding the highly consequential nature of penalty notice regimes, they substantially escape meaningful scrutiny. The result in NSW at least is an administrative system that has evolved in an ad hoc manner, lacking coordination, consistency or any overall coherence, and sorely wanting in terms of transparency.

The NSW Sentencing Council's 2006 report on *The effectiveness of fines as a sentencing option* devoted considerable attention to penalty notices in NSW and made some withering criticisms of the system, quoted at length below:

3.19 Under the current penalty notice system, the Acts, and in many cases the Regulations, prescribe the amount of the penalty that may be imposed for individual offences. The process by which an agency or department fixes the amount of the penalty notice however is not detailed in either the Acts or Regulations, in practical terms being left to determination by the individual government departments concerned with the administration of the relevant legislation.

3.20 While these departments have developed policies regarding offences arising under the legislation within their area of administration, attention has rarely been given to any coordination of the operation of penalty notices as a whole. As a result, the fixing of penalty amounts is uncoordinated, leading to considerable differences between offences which do not seem to be justified by the differences in their objective seriousness, as can be seen from the following penalties:

- \$50 for not wearing a bicycle helmet;
- \$75 for parking in a restricted zone;
- \$100 for feet on a train seat;
- \$225 for exceeding the speed limit by more than 15kph;
- \$300 for not stopping at a red light;
- \$400 for smoking on a train station;
- \$400 for spitting on a train.

3.21 Moreover, there are inconsistent penalties available for certain offences dependent upon the issuing agency...

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<sup>12</sup> A 2011 media release issued by the then NSW Attorney-General relating to the fines scheme provided background information in which it was noted that in the remote town of Boggabilla, population of little more than 1000 people (nearly all Indigenous), there were 365 people subject to driving licence sanctions, 21% for demerit points, 33% by way of court disqualification and 47% for fine default. Given that a proportion of the residents are children or youth, this probably amounts to more than half of the adult population affected by licence sanctions: See Hon Greg Smith, Attorney General and Minister for Justice, Media Release, 'Fines Scheme a Hand up, not a Hand-out', 30/6/11.

3.22 The effect of the arbitrary system of setting penalty notice amounts needs to be viewed in the light of the strict liability nature of penalty notices and the absence of any discretion in the issuing officer to fix a penalty other than in the prescribed amount...

...

3.24 Where there is little avenue for the kind of independent review and due process in the imposition of penalties pursuant to notices which is inherent in the issue of court imposed fines, it is appropriate to ensure that reasonable limits and guidelines are placed upon their use. Particularly is this so in circumstances where it appears that the number of offences being detected and punished by penalty notices is growing at a significant rate.

....

3.89 Extension of the scheme to cover additional offences, whether regulatory or criminal presents significant difficulties and should not occur unless and until there is wholesale review of the system for their issue and enforcement, and unless and until suitable safeguards and guidelines are established applicable to each agency.

...

3.91 The reasons for deferring any extension of the use of penalty notices and CINS include:

- The uncoordinated nature of the system;
- The risk of adverse consequences, particularly to marginalised sections of the community;
- The general undesirability of ‘executive sentencing’;
- Risks associated with net-widening; and
- Adverse public perceptions.

3.92 For these reasons, considerable care would be required in extending the system and should not occur until suitable safeguards are in place to avoid abuse of the system, and to ensure that the enforcement process has sufficient mechanisms and flexibility for its equitable application.

3.93 The system for selecting offences that are amenable to be dealt with by notices, and for setting (and adjusting) penalty amounts, is uncoordinated. This is evidenced by the current wide variations in existing penalties which bear little rational relationship to the severity of those offences, as well as the lack of cross government scrutiny of that system.

3.94 There is a risk of adverse consequences, particularly to the marginalised sections of the community, who are most likely to be the recipients of these notices (excluding traffic offenders), if more and more offences are to be dealt with by penalty and infringement notices, in circumstances amounting to net widening where:

- Their issue effectively involves an administrative act which for the most part (save in the small number of cases which go to the Courts) will escape any form of judicial or public scrutiny;
- Their issue does not permit, of any, alternative other than a monetary penalty, even though in very many cases, other alternatives such as a caution or warning, or diversion to a suitable program, or a disposition under sections 32 or 33 of the Mental Health (Criminal Procedure) Act 1990, or a s 10 bond, would be more appropriate;
- They potentially attract a double penalty under the existing rigid system for enforcement which permits very little (if any) effective administrative review, and which provides for escalating sanctions resulting in a large proportion of the recipients being fixed in a debt trap and having their prospects of employment and rehabilitation adversely affected;
- The system does not permit the same attention to be given to the objective seriousness of the offence, or to the subjective circumstances of the offender, or to any of the general principles of sentencing including punishment, retribution, deterrence, community protection, rehabilitation and so on which the courts take into account in fixing a sentence, since the issue of a penalty or infringement notice is for a fixed and mandated amount, which was arbitrarily determined by a legislative instrument and which is applicable to every case meeting the description of the offence, no matter what the circumstances of its commission.

3.95 Any wholesale shift from judicially determined sentences for offending conduct, to what amounts to ‘executive sentencing’ determined by individual police officers or by employees of Government Departments or of Local Government (who possess no judicial training or experience but are vested with significant powers that can have far reaching consequences both financially and otherwise if enforcement action is undertaken) and where there is little available in the way of any review or public oversight, is generally undesirable.

In addition to the lack of a principled basis underpinning the penalties cited above by the NSW Sentencing Council at [3.20], and in reference to the Discussion Paper’s specific questions regarding offensive language/conduct, we note recent changes in NSW to these offences that well illustrate the problems pointed out by the Sentencing Council. In 2014 as part of the NSW Government’s response to so-called ‘alcohol-fuelled’ violence in Kings Cross and the Sydney CBD, the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) was passed which dramatically increased Criminal Infringement Notice (CINS) or on-the-spot fines for offensive conduct and offensive language (respectively, ss 4 and 4A of the *Summary Offences Act 1988* (NSW)) from \$200 to \$500 (*Criminal Procedure Regulation 2017*, Sch 4). Furthermore, the maximum penalty and on-the-spot fine for the offence of ‘continuation of intoxicated and disorderly behaviour following move on direction’ in s 9 of the *Summary Offences Act 1988* (NSW) were increased respectively from 6 penalty units to 15 (or from \$660 to \$1650) and the on-the-spot fine from \$200 to \$1100.

The significant increases in the value of these CINs greatly exceed the suggested ratio of a penalty notice fine to the maximum penalty recommended by the NSW Law Reform

Commission of 25%<sup>13</sup> - a ratio we would submit should be the maximum utilised for *all* penalty notice offences. Further, the potential for harsh and disproportionate impact of these changes is high. These public order laws are enforced in high numbers each year.<sup>14</sup> The introduction of the option of ‘on-the-spot’ enforcement of ss 4 and 4A of the *Summary Offences Act 1988* (NSW) in 2007 produced a net increase in enforcement actions – rather than a decline for example, in arrest or other modes of initiation of offences such as a Court Attendance Notices.<sup>15</sup> Associated police powers, such as the power to order an apparently intoxicated person to ‘move on’ are also frequently employed.<sup>16</sup> The risk of over-enforcement of these public order offences and over-deployment of associated police powers is exacerbated by the vague and highly subjective standard on which they turn (specifically, ‘offensiveness’<sup>17</sup>); and a lack of clarity over their elements.<sup>18</sup>

As recognised in the Discussion Paper specifically in relation to offensive language, these offences and powers have a long history of disproportionate impact on ATSI persons, implicating them in the over-representation of ATSI persons in the criminal justice system. As indicated above, penalty notices (particularly those that carry heavy fines) can have serious flow-on consequences and these cumulative penalties have been shown to impact disproportionately on ATSI persons in regional, rural and remote communities.<sup>19</sup>

Reforms undertaken since the NSW Sentencing Council Report in 2006 and in response to other reports seek to address some of these issues, but given the scale of the problems they amount to little more than tinkering. Worthwhile changes - mitigation measures (seeking time to pay), WDOs, hardship review, etc - are only likely to have a limited impact on the unfair hardships associated with fines enforcement for the most vulnerable who typically confront major obstacles in negotiating abstruse administrative processes.

Recommendations in the Discussion Paper to provide alternative sanctions (cautions, suspended penalties), to reduce fine levels and to limit the number of infringements per transaction may all be desirable, but given the fundamental structural and accountability problems identified by the Sentencing Council more thorough-going review and reform is essential to effect meaningful change.

The recommendation concerning the recent 2017 NSW amendment giving the Commissioner of Fines Administration the discretion to avoid recourse to driving sanctions in cases of default is also likely to have limited impact. There is no legislative guidance as to how the

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<sup>13</sup> See New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012) at Rec 4.5(a).

<sup>14</sup> See NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2016* (2015), Tables 1 and 2; D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (Sydney: Federation Press, 6th ed, 2015), pp 536-537; and L McNamara and J Quilter, ‘Public Intoxication in NSW: The Contours of Criminalisation’ (2015) 37(1) *Sydney Law Review* 1 at 30.

<sup>15</sup> NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (August 2009); New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012).

<sup>16</sup> NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988* (2014).

<sup>17</sup> L McNamara and J Quilter, ‘Turning the Spotlight on ‘Offensiveness’ as a Basis for Criminal Liability’ (2014) 39(1) *Alternative Law Journal* 36.

<sup>18</sup> J Quilter and L McNamara, ‘Time to define “the cornerstone of public order legislation”: the elements of offensive conduct/language under the *Summary Offences Act 1988* (NSW)’ (2013) 36(2) *UNSWLJ* 534.

<sup>19</sup> Law Council of Australia, *Addressing Indigenous Imprisonment: National Symposium*, Discussion Paper (November 2015), p 18.

Commissioner is to be ‘satisfied that civil enforcement action is preferable’ nor how a potential offender is able to agitate for this discretion to be used. Furthermore, the amendment begs the question of whether civil enforcement sanctions – garnisheeing wages, etc – will be any less onerous or unfair in their effects.

We would also submit that the availability and effectiveness of strategies operating outside the regulatory environments of the criminal justice system should be assessed. This is particularly appropriate in relation to conduct that relates to the ‘diminishing amenity end’ of the criminal harm-anti-social behaviour spectrum. For example, public urination (often after consumption of alcohol) is a frequent reason for charges and CINs for offensive conduct in a public place and associated offensive language charges under ss 4 and 4A of the *Summary Offences Act 1988* (NSW).<sup>20</sup> Solutions that do not require police involvement, including the escalation of risk associated with encounters between police and intoxicated persons, should be encouraged. These include, at a minimum, the wider availability of public toilets and the expansion of other amenities such as good and effective public transport.

### **Sentencing and Corrections**

In light of our earlier endorsement of a ‘bottom-up’ approach and JR, sentencing and corrections present the most pressing challenges. The correctional system is the most centralized, closed and unresponsive part of the criminal justice system. To reduce reliance on imprisonment, the most costly and in many ways damaging penalty, requires a major redistribution of resources. Abolishing short prison sentences and otherwise getting courts to make less use of incarceration depends upon establishing credible alternatives which are supported with appropriate infrastructure and support services accessible to all communities.

We currently have what might be called the 90/10 problem in correctional systems across Australia. On average 90% of correctional budgets are spent on the one third of offenders who are in prison whilst the remaining (miserly) 10% is spent on the other two thirds under supervision in the community (on parole, probation, supervised bonds).

This maldistribution of resources is self-perpetuating. Client to officer ratios in probation and parole are ridiculously high, on average around 16:1 across the country but very much higher in some jurisdictions (eg 45:1 in Queensland). With such ratios there can be no meaningful supervision and support for offenders in the community (for example, in relation to housing, employment, drug and alcohol services, etc). This sets them up to fail. At the same time, it reduces community corrections to the role of monitoring failure and breach (compliance with scheduled reporting, spot checks, periodic drug tests), rather than actively seeking to prevent it. The upshot: often increased parole suspension or returns to court for breaching bonds. In Queensland, suspensions of parole for ‘unacceptable risk’ rose from 292 in 2009-10 to 2659 in 2014-15. Prison populations continue to increase with the consequence that more resources are devoured in simply managing (‘warehousing’) prisoners often in over-crowded conditions at the cost of prison rehabilitation programmes and more effective community-based alternatives. It is difficult to see this vicious spiral being reversed without a wholesale change in philosophy and concerted reform efforts. JR offers some hope if embraced by

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<sup>20</sup> J Fitzgerald, ‘On-the-Spot-Fines and offending: Has the NSW Criminal Infringement Notice scheme increased legal actions for public order offences and shoplifting?’ Paper presented at Australian & New Zealand Society of Criminology Conference, Brisbane, 3 October 2013.

governments. The effects would not be confined to ATSI but would disproportionately benefit them.

Doubtless the above criticisms make too little allowance for variations across jurisdictions and in local practices, but we believe this is the general dynamic driving continuing increases in general prison populations and imprisonment rates, and more particularly increases in the incarceration of ATSI offenders. Well-intentioned and innovative reform measures inevitably run up against these powerful counter-vailing forces.

### **Concluding Comments**

JR has the potential, operating from bottom to top, to render criminal justice institutions more responsive and accountable to local communities and their actual circumstances and needs. If local, bottom-up initiatives like the Maranguka JR project in Bourke are able to recruit local criminal justice personnel – police, magistrates and others – into more cooperative responses and afford problem-solving alternatives, institutional reform might be modelled from below. At the same time, what has been essentially a top-down model of problem-solving justice like the drug courts, might provide some pointers as to what is possible when the criminal justice professions work cooperatively with each other and with offenders, when they seriously engage on a continuing basis with the lives and problems of those under their supervision and have the resources to support these efforts.

A final comment. There is a natural tendency to be problem and deficit centred in discussions of crime and justice, as we have been in this submission. The Discussion Paper refers to several examples of positive practice that strive to work against the detrimental impacts of excessive ATSI contact with the criminal justice system. But more attention might be given to the diversity of ATSI experience, to the lessons that might be drawn from communities with low, or lower, crime rates and contacts with the criminal justice system.